

***County of Maui* Revisited: How the First Application of the “Functional Equivalent” Standard for Discharges to Groundwater Went Wrong**

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The Clean Water Act (CWA) is almost 50 years old, yet litigation regarding its scope remains a dynamic area of law. Just last year, the U.S. Supreme Court finally resolved the circuits’ split on the CWA’s applicability to groundwater in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020). In *Maui*, the Court held the CWA reaches discharges to groundwater contributing pollutants to Waters of the United States (WOTUS) if they are the “functional equivalent of a direct discharge,” which, in turn, “depends on how similar to (or different from) the particular discharge is to a direct discharge.”

The *Maui* decision is an important case to review when evaluating subsurface or land disposal of wastewater, storm water, and other pollutant-containing discharges that may reach groundwater with hydrologic connections to WOTUS. The site-specific facts and the concessions made early on by the County of Maui (County) were significant both to the Supreme Court’s decision and to the federal district court’s decision on remand. *Maui*’s outcome case on remand provides an object lesson and illustrates how the Supreme Court’s standard is susceptible to misapplication. Practitioners should study the arguments and factors set forth in *Maui* and, applying the lessons learned from the early judicial test in the district court, note how their own case’s facts and circumstances are similar or different.

Background

The County operates the Lahaina Wastewater Reclamation Facility (Facility), at which approximately four million gallons per day of treated effluent are disposed using four injection wells. In 2012, environmental groups brought a CWA citizens’ lawsuit alleging the County was discharging a pollutant to a WOTUS (i.e., the Pacific Ocean) without a CWA permit. Tracer dye testing conducted in 2013 showed treated effluent mixed with groundwater, and less than 2 percent surfaced in the Pacific Ocean through certain seep vents approximately half a mile from the Facility within 84 days to 16 months after disposal.

The Supreme Court’s Seven Factors

While recognizing that Congress intentionally left “groundwater regulatory authority to the States,” the Court held the CWA “requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.” The Court found this language captured “those circumstances in which Congress intended to require a federal permit” and that a CWA permit is required when the point source directly deposits pollutants into WOTUS or when the discharge reaches the same result through roughly the same means.

The Court outlined seven potentially relevant factors¹: 1. transit time; 2. distance traveled; 3. nature of the material through which the pollutant travels; 4. extent to which the pollutant is

diluted or chemically changed as it travels; 5. amount of pollutant entering WOTUS relative to the amount leaving the point source; 6. manner by or area in which the pollutant enters WOTUS; and 7. degree to which the pollution (at that point) has maintained its specific identity.

The Court did not provide clear guidance on their application, except to state that time and distance are important. With regard to time and distance, the Court simply differentiated between a few feet and 50 miles, stating that when a pipe emitting pollutants ends a few feet from WOTUS, the CWA clearly applies. Conversely, the CWA does not apply if the “pipe ends 50 miles from navigable waters . . . emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later.” In the middle instances, the outcome will depend on what happens along the way.

Remand to the District Court

On remand, the plaintiff environmental groups argued that the Facility’s discharge of treated and disinfected wastewater from its wells via groundwater to the ocean satisfied the “functional equivalent” standard. Unfortunately, the County’s own experts opined that, ultimately, 100 percent of the injected wastewater flowed from the wells to the ocean and that the minimum distance the water traveled was between 0.3 and 1.3 miles. While the district court recognized that certain chemical and biological reactions occurred in transit (resulting in lower levels of nitrogen and phosphorous), the County had essentially waived arguments premised on that change by conceding that “pollutants” were being released at the seeps. Thus, the County had already conceded that “pollutants” left the wells, traveled through groundwater, and that 100 percent of the wastewater made its way to the ocean, even before the district court applied the Supreme Court factors to determine if there was the functional equivalent of a discharge.

Rather than carefully analyzing the relevant facts against the Supreme Court’s factors, the district court glossed over significant nuances in the facts it expressly considered. For example, the district court failed to fairly weigh (in a light most favorable to the County) how certain nitrogen-containing compounds are both significantly diluted by groundwater (*Maui* factor 4) and chemically changed in transit (*Maui* factor 7); and that most of the County’s effluent reaches the Pacific Ocean via diffuse base flow (more akin to nonpoint discharges than point source discharges) (*Maui* factor 6).

The district court noted the environmental impact of the discharge “might conceivably be a factor in an analysis of whether a discharge is the functional equivalent of a direct discharge,” but the court seemed to give that factor no weight. The court also failed to consider whether regulating the County’s indirect discharge of a relatively trivial amount of water into a vast waterbody advances the CWA’s express purposes (i.e., to restore and maintain the integrity of the nation’s waters) “without undermining the States’ longstanding regulatory authority over land and groundwater.”

County’s Concessions Were Problematic and May Have Been Determinative

The district court's failure to analyze the salient factors in more depth may be directly related to the County's concessions, failure to submit additional evidence, and failure to argue that the groundwater-wastewater mixture emanating from seeps and diffuse base flow differed substantially from wastewater introduced into the wells and, therefore, was not the functional equivalent of a direct discharge.

The district court's decision is an inauspicious beginning to the application of the Supreme Court's functional equivalent standard. It could suggest that, at worst, the CWA should regulate a discharge to groundwater simply because *some* (relatively insignificant) volume reached WOTUS (even a vast ocean) through a discernable feature over time frames as long as 3 to 16 months. But we submit that the CWA does not regulate discharges of *any* volume of *water* attributable to a wastewater stream that eventually reaches a WOTUS. Rather, in *Maui*, the Supreme Court made clear that the CWA regulates the discharge of pollutants via groundwater only if it is *similar enough to a direct discharge* to constitute the functional equivalent of a direct discharge.

The district court's orders granting summary judgment without a trial and rejecting a request for reconsideration show that the County may have erred by not educating the court on the meaning of the terms "effluent," "injectate," "wastewater," "sewage," "municipal waste," or "pollutant" and the consequent nuances in applying the CWA jurisprudence. The court characterized wastewater as a whole to be a pollutant, citing nothing for that proposition, and concluded that the discharge on the order of thousands of gallons per day (constituting less than 2 percent of the volume injected on a daily basis) into a vast ocean would be enough to trigger National Pollution Discharge Elimination System (NPDES) permitting despite distinct changes in the chemical makeup of that wastewater during its underground transit. By implication, a facility discharging 1,500 gallons per day to its septic system could be subject to NPDES permitting if as little as 30 gallons (2 percent) of that flow reached WOTUS months after infiltration. Were this approach to become generally accepted, facility operators would need to obtain NPDES permits as a default unless they could (afford to) develop models showing they do not contribute any measurable base flow to WOTUS or that the water reaching WOTUS does not contain "pollutants" requiring a NPDES permit. However, this approach is not binding on other courts and its reasoning invites pushback. For example, if it were enough that *some* (any) amount of a wastewater stream reaches WOTUS via groundwater, the other factors in the SCOTUS functional equivalent standard would be superfluous.

What to Do

The time for the County's appeal has passed, so the district court's problematic decision will stand. Other courts are wrestling with the functional equivalent standard as well, but as of this writing, there are no reported cases in which a decision based on the functional equivalent standard has been finally rendered.

Key takeaways for practitioners in the defense bar handling similar cases: 1. consider in advance how expert statements may be interpreted, both as admissions and to make your arguments; 2.

make certain you clearly understand and explain the technical terminology used in your circumstances, including the significant nuances they contain; 3. instruct the fact finder on the biological and chemical treatment effectively provided by soils, sediments, and biological communities entrained therein; and 4. contrast the nature of diffuse, attenuated *migration of groundwater pollution* (a *condition* not regulated under the CWA) with direct, concentrated, unattenuated discharge of *pollutants* (i.e., *constituents* regulated under the CWA) to WOTUS via outfalls. By doing so, you may be able to avoid the need for an NPDES permit in some of these challenging situations.

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Endnote

¹ Notably, these seven factors were identified as illustrative rather than exhaustive (the listed factors were prefaced as follows: "Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case)"), and the Court noted that additional guidance could be provided by both EPA and the courts (noting the utility of the common-law method, as "decisions [] provide examples that in turn lead to ever more refined principles").